WALLER

DISTRIBUTION OF WATER RIGHTS

Right of State to Regulate Distribution of Water Rights

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RIGHT OF STATE TO REGULATE DISTRIBUTION OF WATER RIGHTS

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It is the unanimous consensus of authority that the use of water in the arid region of the West, especially for the irrigation and reclamation of land, is a public use, in which the general public are directly interested, and that the state has authority to supervise the distribution of the waters within its boundaries and to deliver them to those having the lawful right to use the same. This is to prevent a conflict of rights and to insure to each owner of a right the uninterrupted enjoyment of his own. There can be no absolute title to the corpus of the water of a stream or other body of water, either by the public or an individual, so long as it flows naturally. It is like the air—a naturally-flowing substance, incapable of absolute ownership. However, a right may be acquired to the use of running water, or to a certain amount of running water, which the law will regard and protect as property. Further than this the law will not, because it cannot, go.

"Water is the property of no one, and subject to the regulation and control of the state in its soverign capacity." 22 Idaho, 236; 43 L. R. A., 240.

Power of State.

The power of the state over public waters within its boundaries is limited to the enactment and enforcement of such reasonable police regulations as may be deemed necessary to preserve the common right of all. McLennen vs. Prentice, 85 Wis. 427. Kinney 2nd Ed., Sec. 334.

The method of acquiring the right to the use of water by appropriation is based on the civil law, ancient customs, and the method adopted by the miners in California when all the lands and the streams were in Federal ownership. By the federal statute of 1866 free access was permitted to any one over the lands of the United States for the purpose of posting a notice of the appropriation of water, the owner of the fee (the United States) waiving its rights as a riparian owner; but these rights were not waived as against lands in private ownership. Consequently, there grew up in California, and in other states adopting her system, two conflicting methods of acquiring the right to the use of the public waters. I say "conflicting" advisedly, since it took an Act of Congress to remove the cloud from the water titles of the California miners, and in every other Western state where water titles have been defined and made a matter of record, it has required the enactment of a water code that provides for a title based on use.

The leading English case—Mason vs. Hill—laid down the doctrine that the use of running water was limited to those past whose land the stream flowed, as a common benefit, to be enjoyed by them equally, with priority to none. Wiel, in his text on water rights in the Western states says: "'The most essential feature of the common law, the exclusion of non-riparian owners of lands from rights to streams on private land, is not changed nor modified in California, but is in force there as in England," and cites Miller and Lux vs. Madera Canal Co., 155 Cal. 59, as authority. The rule likewise applies in Washington. "Any statement that non-riparian owners have rights in streams (except by grant, condemnation, and prescription) if meant as a statement of general principle, is not in harmony with the philosophy of the common law."

In Lux vs. Haggin the court says: "The right of any riparian owner to restrain the diversion, by other than riparian owners, of water which would, if undisturbed, flow past their lands, does not rest upon the extent to which they have used the water, nor upon the injury which might be done to their present use. Even if these plaintiffs had never made any use of the water flowing past their land, they had the right to have it continued in its customary flow, subject to such diminution as might result from reasonable use by other riparian proprietors. This is a right of property, a part and parcel of the land itself, and plaintiffs are entitled to have restrained any act which would infringe upon the right."

In Miller and Lux vs. Madera Canal Co. 155 California 59, the ruling of the court is prefaced on the facts that the river banks through the Miller and Lux property were low and that floods annually overflowed them, and deposited on such land large quantities of fertilizer and enriching materials, increasing their productiveness and enhancing their value. The defendants wished to store such flood waters for use on non-riparian lands. The court held, "That the riparian proprietor is entitled as against the non-riparian taker to the ordinary and usual flow of the stream. There is no good reason for saying that the greatly increased flow following the annually recurring fall of rain and melting snow in a region about the head of the stream is any less usual and ordinary than the much diminished flow which comes after the rains and melting snows have run off. The doctrine that the riparian owner is limited to a reasonable use of the water applies only as between different riparian proprietors. As against an appropriator who seeks to divert water to non-riparian land, the riparian owner is entitled to restrain any diversion which will deprive him of the customary flow of water, which is, or may be beneficial to his land. He is not limited by any measure of reasonableness."

In this state the courts have followed the above California case and in the case of Still vs. Palouse Irrigation & Power Co., 64 Wash. 606, ruled that, "As between themselves bank owners must make a

reasonable use of the waters of the stream. This applies to all uses, irrigation included, but a reasonable use in this state as among water users, does not apply as between riparian owners and those using under appropriation." In Longmier vs. Yakima Highlands Irrigation Co., in the Superior Court of Yakima County, the court said: "As between a riparian owner and a non-riparian diverter, the doctrine of reasonableness of use has no application."

We shall see that riparian rights are now established in this state side by side with appropriation rights, the former for private lands and the latter for public lands. The law of appropriation is confined to acquisitions of public lands, and the common law of riparian rights is the general law of streams, the banks of which are in private ownership. See Benton vs. Johncox, 17 Wash. 277. And since the rule by the Forestry Department abrogates the statute permitting water appropriations on federal lands, our public waters are practically under control of the bank owners.

Right of Appropriation.

Alongside of these rules laid down by our courts, the legislatures of 1890-91 and 1899 have enacted the following, under which statutes large appropriations of water have been made, and many millions of dollars have been spent both in putting them to beneficial use and developing the country under rights so acquired:

"The right to the use of water in any lake, pond, or flowing spring in this state, or the right to the use of water flowing in any river, stream or ravine of this state for irrigation, mining, or manufacturing purposes, or for supplying cities, towns or villages with water, or for water works, may be acquired by appropriation, and, as between appropriators, the first time is the first in right." L. 91, p. 327, Sec. 1, Rem.-Bal. Sec. 6316.

Appropriating Surplus Water.

"Any person, corporation or association of persons is entitled to take from the natural streams or lakes in this state water for the purposes of irrigation and mining, not theretofore appropriated or subject to rights existing at the time of the adoption of the constitution of this state, subject to the conditions and regulations imposed by law; provided, that the use of water at all times shall be deemed a public use and subject to condemnation as may from time to time be provided for by the Legislature of this state." L. 99, page 261, Sec. 1; Rem.-Bal. Sec. 6325.

Rights of Riparian Owners To Use Water.

"All persons who claim, own or hold possessory right or title to any land, or parcel of land, or mining claim within the boundaries of the state of Washington, when such lands, mining claims or any part of the same are on the banks of any neutral stream of water, shall be entitled to use of any water of said stream not otherwise appro-

priated for the purposes of mining and irrigation to the full extent of the soil for agricultural purposes." L. 99, p. 261, Sec. 2; Rem.-Bal., Sec. 6326.

Rights of Non-Riparian Owners.

"Any person who owns or has the possessory rights to lands in the vicinity of any natural stream or lake, not abutting such stream or lake, may take water from such stream or lake if there be any surplus of unappropriated water in such stream or lake." L.90, p. 707, Sec. 7; Rem.-Bal. P. 6331.

Under these statutes it will be observed that there is no law limiting the amount of water that may be filed on from any stream or lake. On some streams the appropriations now on file call for many times the amount of water available, and yet there is no law prohibiting further appropriations, no officer whose duty it is to eliminate excess appropriations and protect water users against future encroachments upon their rights, nor to determine when an initiated right has lapsed.

The doctrine that a riparian right is a property right, a part and parcel of the land, is acquired when the land is acquired, is not acquired by use and cannot be lost by disuse, has been upheld in California, Washington, Kansas, Montana, North Dakota, (Oklahoma, possibly) and South Dakota and partially in Nebraska, Texas and Oregon and has been rejected in eleven states as not applicable to arid conditions where irrigation is necessary to the development of the country. Those rejecting it are Colorado, Arizona, Alaska, Idaho, New Mexico, Nevada, Utah, Wyoming, partially in Nebraska, Oregon and Texas, New South Wales, Victora, Australia, and the Northwest territories of Canada, India and Egypt. In support of this see 20 Wash. 507, also Kinney on Irrigation and Water Rights, Sec. 1901.

Before any irrigation legislation whatever was enacted in Canada, the Canadian government sent a commissioner to the Western part of the United States to make a study of our laws. Upon his return this commissioner presented a report in which the first suggestion was:

"The total suppression of all riparian rights in water, so that the same, being vested in the crown, may be distributed under well considered governmental control for the benefit of the greatest possible number."

The abolition of riparian rights and vesting the absolute control of all water in one strong central authority are the important provisions in the Northwest Irrigation Act.

In states adopting a modern water law, riparian users have been in no way injured, but rather have been given rights as appropriators, said right dating back to the time when they first began to use water beneficially. Their titles have been defined and provide for a definite amount of water, the users were given established priorities.

Their rights were made a matter or record and can be abstracted as land titles are. They have a market value, and are saleable because they are definite, and the purchaser of a title that is not open to endless lawsuits.

But in this part of the country, where the demand for water is each year becoming greater and greater, as the country is becoming more and more settled, we consider that upon the question of the flow of the stream adjacent to the lands of a riparian owner, the correct rule should be that if the riparian owner does not actually apply the water to some beneficial purpose, others should be permitted to appropriate it who will use it. The tendency of the decisions is already in that direction. In fact, this is the only method of reconciling these two principles of law, which if each is strictly enforced, are so irreconcilable."

"Thus in two states which still adhere to the common law there would be at least one uniform law applicable to both systems, and that is, that in order to hold a right to the use of water under either system, there must be an actual application of all of the water claimed to some beneficial use or purpose."

Kinney, Irrigation, Sec. 823.

In section 820, Kinney in substance says: "On account of the rapid settlement of the arid country and the great demand for water we believe the time is not far distant when the courts will hold that the riparian owners' right as against that of appropriators above him will depend upon the amount of water which he actually applies to a beneficial use, upon the principle that his right to the water is simply usufructuary; and if he does not use the water, it is an abandonment of this right, and others may take the water who will use it. This would apply the same rule of use to the riparian claimant as the appropriator.

No good reason can be advanced why such a rule of use should not apply in both cases. The appropriator and the riparian claimant both, either directly or indirectly, acquired their rights to the use of the public waters through Federal enactments, one recognized by virtue of the custom of humid England and the other by custom of all arid regions the world over, and there is no good reason why one should exercise a privelege not enjoyed by the other. In 47 Wash. 314 the Supreme Court of this state have indicated their intention to follow such a principle. The court says: "We think it comports with the general policy of the state to hold that this statute contemplated the use by the abuting owner of the water necessary for his present needs and for those that accrue, as he in good faith proceeds with reasonable dispatch to construct the means for applying the water to his adjacent arid lands," water to be used within a reasonable time, say two years.

The statute gives the riparian owner a preference right to the use of the water adjoining his lands upon the theory that he needs

and will avail himself of the privilege thus given him. If he is not using the water and does not propose to use it as soon as practicable in the ordinary and reasonable development or cultivation of his lands, then there is no reason why the water should be withheld from others who need and will promptly use it if permitted to do so. In view of the great need for water in this arid country, none of it should be permitted to run to waste by riparian proprietors and others. In order that the greatest good may come to the greatest number, others who will use the waters of the state should be permitted to acquire the right to their use. See also Northport Brewing Co. vs. Parrot, 22 Wash. 243. Commenting upon this case Judge Reavis says: "This case would seem to limit riparian rights to the beneficial uses of water by their riparian owners and thus leave any question of injury to the diminution in quantity of the flowing stream intangible and academic."

Dual System of Water Rights.

In those states adhering to the common law rule of riparian rights and by statute providing for the appropriation of water, as we do in Washington, we have dual systems of law, governing waters, which are antagonistic in principle, and consequently are usually clashing. One exists by virtue of a statute and the other through court decrees. These two systems are antagonistic in their foundation principles, and are therefore antagonistic when it comes to their application. Had the government of the United States taken as much pains in disposing of the waters of the public domain in as uniform and systematic a manner as it did of the public lands in the arid region over which these waters run, the greater portion of which lands are absolutely worthless without the application of water, the laws regarding water rights would not be in their present unsettled and inharmonious condition.

At present, the appropriators on our streams, in many instances, have filed on more water than the stream could supply; and under the constitution and statute claim the right to beneficially use it all. In opposition to this the bank owners under common law rules claim the right to have all of said waters flow past their lands; and have a right to restrain the diversion of said waters to any lands beyond those owned by the bank proprietors.

Mead says: "No one, whether an appropriator or a riparian proprietor knows definitely how much water he is entitled to, nor how soon he may have to defend his rights in a long and costly law suit."

Eminent Domain.

By statute one wishing to acquire the water rights of a riparian owner for a public use may do so by taking them under an eminent domain proceeding, but only such part of the water as the owner is not now using for irrigation or as will not be needed by him in the future.

Kinney on Irrigation and Water Rights, Sec. 1089, says: "That the difficulties in the way of getting the proper defendants in a suit to condemn riparian rights are practically prohibitive against the bringing of such action, although the abstract right to condemn such property may be given by statute, and that, if possible, it would be a vastly expensive proceeding."

In 45 Wash. 625, Rudkin says: "The distribution of the waters of a stream among riparian owners, according to common law principles, is most difficult."

In this state the condemner must first pay for a right of way across riparian lands and then for the use of water in excess of the riparian owners' present needs and any contemplated use that said owner may desire to put the water to within a reasonable time.

In other words, the bank owner is presumed to have a right to the use of the public waters of the state in excess of his present and contemplated needs, and if any one else wants to use such excess he must go to the expense of buying it on a holdup basis or undertaking the herculean task of condemning it. And yet the rights which the purchaser must buy or condemn in order to obtain immunity from injunction are recognized as of no general worth. For, in assessing damages on unused riparian rights in Nebraska, the courts have held that where the riparian proprietors were possessed of the naked right to a reasonable use of the waters of a stream, yet where such a right is not coupled with an actual diversion or application of such waters to some beneficial use, the measure of damages for future use, defeated by the taking, cannot be considered. McCook Irrigation Co. vs. Crews. 70 Neb. 115.

Kinney says: "In those state which adhere to the common law of riparian rights * * * these rights should be condemned for public uses, and the measure of damages should be based upon the present use that is being made by a riparian proprietor, and not upon some vague, uncertain scheme for the use of the water in the future."

Under the doctrine laid down in the Still case, 64 Wash. 606, and recently followed in a case in the Superior Court of Yakima County, every riparian owner on any stream in Washington not only has a right to the use of water for domestic and irrigation purposes, but as against the appropriator of water, has a right to his method of use, however wasteful that may be. Chandler says: "The conclusion to be drawn from these cases is that the lower riparian owner may not only enjoin from the diversion of the natural flow, but may also enjoin the storage of even the flood waters if such storage will result in damages, either present or prospective."

Rights to Store Water Cannot Be Acquired by Condemnation.

Under the riparian doctrine it will be impossible to store the flood waters of our streams for us upon non-riparian lands unless

the bank owners are bought off at their own prices. Under our statute and the rulings of our courts, the privilege of storing flood waters to be used on other that riparian lands cannot be acquired by condemnation, because the statute expressly says that the right to condemn riparian rights "Is not intended in any manner to allow water to be taken from any person, that is used by said person himself for irrigation, or that is needed for that purpose by any such person"; and in the cases cited the courts have said "that the flood waters were being used by the riparian owners." In Still vs. Palouse Irrigation & Power Co., 64 Wash. 606, the court says: "In this case the respondents do make use of the high waters, and the greatest use and benefit to their land comes from such use." This leaves the riparian owner to sell his flood water rights, or not, as he likes, and at any price he may see fit to ask or accept. Under such conditions, men of ordinary business sagacity will not invest their money in water right projects. Under such a rule of law the rights of all water users, acquired by appropriation, and now put to a beneficial use, are open to attack by any riparian proprietor who may wish to hold up the water level in the stream so it may either flood or "sub" his land.

Investments of Appropriators in Jeopardy

Abstract from argument of defendant's attorney in the case of Lux vs. Haggin.

"The interests involved in this suit are of such magnitude, not only as between the parties themselves, but also as to thousands of others, and the result reached so disastrous to the defendants, so destructive to the vast and beneficial improvements made by them in good faith and in the belief that the same law as to those matters applied both to the state and government lands in California, so disastrous to the people of a large part of California, and so destructive of all those great interests which have grown up under the irrigation system based upon the doctrine of appropriation to beneficial uses, that we firmly believe your honors will wish, even if in the end you feel compelled to adhere to the views already expressed, to do so only after you have permitted argument to be exhausted upon the subject and have received all the light which the profession can give. No matter how onerous and pressing the duties which devolve upon your honors, there is, we submit, before you no question or business which can compare in public interest to the inquiry whether the decree shall stand which condemns to absolute barrenness the thousands of acres of land reclaimed from the desert by the vast expenditures of the defendants here and now a garden of productiveness and beauty, in obedience to the law of another country, based upon the customs, and arising under conditions the most diverse from ours; whether in obedience to that law, a large part of this state, after a progress almost unparalleled and improvements made at incal-

culable cost of labor and treasure, is to be condemned to return to sterility and unproductiveness; whether, in obedience to that law, the wheel of progress is to be turned back and the present prosperity of thousands, changed into ruin and poverty that a few men, who happen to own land on the banks below may enjoy the pleasure of seeing the stream flow as it was accustomed to flow. Your honors will not, we are sure, forget that this decree, if it is to stand, not only overthrows the progress of the past, but puts a perpetual ban upon the future progress and development."

If the rule laid down in Miller & Lux vs. Madera Canal Co. supra, and followed by our own Supreme Court in Still vs. Palouse Irrigation & Power Co., 64 Wash. 606, and in the case of Longmier vs. Yakima Highlands Irrigation Co. is the law in this state, then the extract from Mr. John Garber's argument (though gloomy) is entirely applicable to our conditions.

In 64 Wash. supra, the Court says: "A riparian owner, such as respondents are her shown to be, has a right to the natural flow of the waters in their natural and accustomed channels without diminution or alteration, subject only to such rights and use in every other riparian owner, a right that is as much included in the ownership of the land as the soil itself, and can no more be interfered with by the act of others. And, while the application of this doctrine has in some of the Western states sometimes been denied, on the theory that the rules of the common law respecting riparian owners were inapplicable to conditions and necessities of the people in the particular localities where the cause of action arose, it has since its first announcement here invariably been upheld in this state, excepting where it has been subjected to a priority of appropriation."

Citing Crook vs. Hewitt, 4 Wash., 749; Rigney vs. Tacoma Light & Power Co., 9 Wash. 576; Benton vs. Johncox, 17 Wash. 277; New Whatcom vs. Fairhaven Land Co., 24 Wash. 493; Madison vs. Spokane Valley Land Co. 40 Wash. 414; McEvoy vs. Taylor, 56 Wash 357.

Considering the fact that the great bulk of the water now diverted and used for irrigation purposes in the state was acquired under appropriation statutes, and that millions of dollars have been invested in developing such water rights and that millions more have been invested by substantial citizens who live under such projects, there would seem to be a legal and moral duty resting upon the state to remove the cloud from such titles, to define them, and to make them a matter of record.

Water Right Litigation.

The history of water rights in those states operating under the common law of riparian rights is that of endless litigation and delay in development of their natural resources.

In California, following the common law rule, millions of dollars have been spent in water litigation without settling the rights of any-

body except those directly parties to the litigation. "Under existing conditions water rights in California cannot be settled until every claimant on each stream and stream system has sued or has been sued by every other claimant thereon." (See Conservation Commismissioner Report of California, 1912.) Washington in adopting the riparian doctrine, has placed every water title in the state in the same jeopardy as those in California.

All water rights in this state are open to attack in the courts, and can never be defined and made definite until each claimant of a water right has sued every other claimant on the stream or stream system, or has been sued by them. And even then there is now nothing but the bringing of another suit to prevent the newcomer from filing an appropriation and using the water of the person having the right to it under the decree.

It is readily seen that the cost of such a series of proceeding would be appalling, and even then, could arrive at no final results until our appropriation laws are amended and riparian rights are defined as to quantity and method of use.

Kinney, in section 1531, says: "Although a person may make a valid prior appropriation of water of a natural stream or other source of natural water supply, may record his notice in accordance with the law; he may apply the water to some beneficial use or purpose for many years; he may lay claim to his rights adversely to all the world, and yet this is not deemed sufficient determination of his rights, for the reason that there may be many others who have made like appropriations from the same source of supply, and whose claims are bound in time in some manner to conflict with the claims of the prior appropriator.

"Simply because a person lays claim to a certain right, although he does it by means of notice to all the world, and while it may put others on their guard, it is not proof of the validity of the claim.

"The title to a water right is not perfect in any claimant until there has been and adjudication or legal determination of the same and the title thereto adjudged to be in the claimant as against all the world."

There never has been any method in this state, and there is no method now, by which the titles to the use of water can be quickly, inexpensively and finally determined.

It has been said in states that have adjudicated their water rights that the court decrees conferred no new rights, but embodied in the form of a permanent, binding decree the evidence of a pre-existing right. Since many of the water rights of this state are based on use, and since the bulk of such holdings is in the hands of small holders and those least able to defend their rights, it is desirable that the evidence upon which such rights and priorities rest should be made a matter of record before the old settlers have passed away.

Since 1904 three water code commissions have been appointed by the governors of the state to report bills to the Legislature that would cure existing evils in our water law, and by making titles secure to thereby promote the development of the state. Concerning the adaptability of the bills reported by the several commissions, I quote the following:

Proposed Law Satisfactory.

Kinney says that, in general, water laws, "such as here proposed for this state, have given the greatest satisfaction, and there has been no attempt to repeal them in states where they have once been adopted. In operation they have been found so salutary and free from unnecessary expense as to command the tacit endorsement of all subsequent Legislatures."

The bill proposed to the 1904 Legislature, and the ones following were prepared after a great deal of study and each of them has received the approval of some of our ablest jurists and law writers. On the House Bill 284 of the twelfth Legislature in 1911, Mr. Kinney said: "We have made a careful examination of the proposed bill and believe that it is one of the best that could be adopted under the circumstances and conditions existing in the state." He further says: "As slow as the state of Washington has been in taking up the work of irrigation and the reclamation of its arid lands, the Legislature has been even slower in enacting sufficient laws for the control, appropriation and distribution of the water within its boundaries. The method of appropriation of the water within the state may be considered antiquated in these times of water irrigation codes."

Of Senate Bill 405, introduced into the last Legislature Judge Will R. King, formerly supreme court justice of Oregon and now chief counsel and commissioner of the United States Reclamation Service, in a recent letter said: "Your recent communication, inviting my views upon the proposed water code for your state (Senate Bill 405), at hand. I have carefully examined this measure and must say that, while it is not just as I would have it in all respects, I believe its adoption would give your state the most efficient water code yet adopted anywhere. It is, in effect, very similar to the Oregon water code. It, however, has some decided improvements."

Results to Be Secured.

Concerning the results to be secured by such an enactment Judge King in discussing the law of water conservation and use for Oregon, previous to the enactment of her water code, in part said: "A central office will be provided, where a complete and reliable record of all water rights as initiated, or of early rights as determined, can be found."

"A letter addressed to this office will bring by return mail a definite statement as to the amount and priority of any recorded

right, whether vested or only initiated. If a prospective investor desires to know the total amount of vested rights to water from a stream in order to ascertain the amount of surplus water, eventually this can be furnished without delay. And no right to use of water from any public stream can thereafter become vested except upon compliance with law and complete record in the central office."

"If surplus water is believed to exist in any stream, a definite method of procedure will be provided whereby a vested right to such water can be secured.

"Instead of posting a notice in the brush on the bank of a stream where no one can find it, as under the present law, the date of priority will relate back to the date of receipt of an application in the office. Any application which is in proper form, as prescribed by law, can be filed then as now. Notice of such application shall be given by publication in a local paper and a time set to hear and consider any objections by those who may be injured by such diversion."

Actual construction will be commenced and prosecuted at the discretion of the hydraulic engineer. And if the terms of the permit are not complied with, the right will revert to the state. When the appropriation has been complied with, by the application of the water to a beneficial use, a certificate in evidence of the right shall be issued and recorded in the office of the state hydraulic engineer and in the auditor's office in the county in which the right is to be exercised.

Vested rights will be defined and become a matter of record so that said rights may be abstracted as land titles are. This will make holders of water rights secure in such rights and open a field for legitimate investments.